

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2059

To be argued by:
MARJORIE EVANS REIFLER

ORIGINAL

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----X
SAMUEL ALLEN, RAYMOND HARDRICK and :
MELVIN LEMMONS, :

Petitioners, :

--against- :

COUNTY COURT, ULSTER COUNTY, NEW YORK :
WOODBOURNE CORRECTIONAL FACILITY, :
Woodbourne, New York, :

Respondents. :
-----X

BRIEF FOR RESPONDENT-APPELLANT

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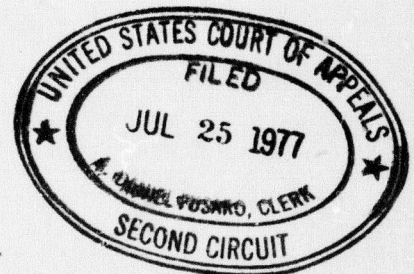


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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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SAMUEL ALLEN, RAYMOND HARDRICK and :
MELVIN LEMMONS,

Petitioners, :

-against- :

76 Civ. 4794
R.O.

COUNTY COURT, ULSTER COUNTY, NEW YORK :
WOODBOURNE CORRECTIONAL FACILITY,
Woodbourne, New York, :

Respondents. :

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BRIEF FOR RESPONDENT-APPELLANT

Questions Presented

1. Whether the District Court was in error in holding, as a matter of law, that the statutory presumption in Penal Law § 265.15(3) did not apply to the facts of this case?

2. Whether Penal Law § 265.15(3) is constitutional on its face?

3. Whether petitioners waived their claim by not objecting to the jury charge?

Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York, dated April 28, 1977 (Owen, J.), granting petitioners' application for federal habeas. The District Court's opinion is dated April 19, 1977 and is reproduced in appellants' appendix.

Facts

A. The Arrest

Petitioners and a fourth defendant, a sixteen year old girl, were driving a borrowed car on the New York State Thruway on March 28, 1973 when they were stopped by State Police for speeding. The driver, petitioner Lemmons, produced a temporary New York registration certificate and Michigan driver's license. A radio check indicated Lemmons to be a fugitive from Michigan on a weapons charge. Lemmons was therefore arrested and placed in a patrol car.

At this point one Trooper Askew returned to the vehicle Lemmons had been driving. As Askew peered through the front window on the passenger side, he observed part of a handgun protruding from an open handbag resting on the floor between the front seat and the door of the car. Askew opened the door and seized a loaded .45 automatic pistol, beneath which he found a loaded .38 revolver. The remaining three occupants were then arrested. A subsequent search of the vehicle's trunk disclosed a loaded machine gun and more than a pound of heroin. Petitioners were indicted for criminal possession of a dangerous drug in the first degree, unlawful possession of a machine gun and unlawful possession of a loaded handgun (two counts).

B. The Pre-Trial Suppression Motion

After a pretrial hearing, the trial court denied petitioners' motion to suppress the seized contraband. In its decision, the court held that the arrest of Lemmons on the fugitive warrant was valid; that the seizure of the handguns, exposed to open view as they were, was proper; that the arrest of all occupants of the automobile for possession of the said guns was lawful; and that their joint involvement in such handgun charges furnished the

police probable cause for the warrantless search of the car trunk.

C. The Trial

At the trial the prosecution relied upon statutory presumptions to establish petitioners' constructive possession of the two handguns, the machine gun and the heroin. The statutory presumption applicable to the two handguns is set forth in New York Penal Law, § 265.15(3), which reads as follows:

"The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, defaced firearm, silencer, bomb, bombshell, gravity knife, switchblade knife, dagger, dirk, stiletto, billy, blackjack, metal knuckles, sandbag, sandclub or sling-shot is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except under the following circumstances: (a) if such weapon is found upon the person of one of the occupants therein; (b) if such weapon, instrument or appliance is found in an automobile which is being operated for hire by a duly licensed driver in the due, lawful and proper pursuit of his trade, then such presumption shall not apply to the driver; or (c) if the weapon so found is a pistol or revolver and one of the occupants, not present under duress, has in his possession a valid license to have and carry concealed the same."

The petitioners offered no evidence to rebut the statutory presumption as it applied to their possession of the handguns. However two witnesses were called by the defense in an effort to impeach the testimony of Betty Anderson who testified that she had seen the petitioners transfer "something" from their vehicle into the trunk of the vehicle they had borrowed from her brother. The jury acquitted the petitioners of the first two counts of the indictment but found them guilty of both counts of unlawful possession of a loaded handgun.

At the sentencing proceeding, the young female passenger was adjudicated a youthful offender and sentenced to five years probation.*

State Court Appeals

Petitioners' convictions were affirmed (3-2) by the Appellate Division, Third Department, 44 A D 2d 243

* Mr. Goldberger a member of the firm representing the petitioners in the instant matter stated at the sentencing proceeding that:

" . . . I think the Court knows full well that those two guns in Miss Murphy's purse weren't Miss Murphy's guns. It is true she may have been carrying them for one or all three of the other gentleman, but those weren't her guns; those two cannons." (Respondents' Appendix, page A78)

(1975). The majority affirmed without opinion. The dissenters agreed that the seizure of the gun was valid on a "plain view" theory but concluded that the presumption of § 265.15(3) was inapplicable to petitioners on the facts of the case.

The New York Court of Appeals affirmed the conviction. People v. Lemmons, 40 N Y 2d 505 (1976). The majority of the court held that the guns were validly seized under a "plain view" theory, and that the applicability of the presumption in the case was a question of fact for the jury.

Judge Wachtler agreed that the weapons were validly seized on a "plain view" theory, but concluded that, "as a matter of law", the guns in question were found "upon the person" of Miss Murphy within the contemplation of the statute.

In a separate opinion, Judge Jones voted to affirm the convictions on the ground that the applicability of the presumption was a question to be left to jury determination. Judge Jones noted the defendants did not object to the fact that the charge did not include a statement of the exception to the presumption which applies "if such weapon. . .is found upon the person of one of the occupants."

District Court Opinion

On April 19, 1977, the District Court granted petitioners habeas corpus relief. Although the court did not decide whether § 265.15(3) is unconstitutional on its face, it applied the test set forth in Leary v. United States, 395 U.S. 6, 36, (1969) to the facts of the case and found that possession could not reasonably be inferred from the presence of the handguns in Miss Murphy's open purse. The Court then concluded that, as a matter of law, the trial judge was in error in denying the petitioners' motion to dismiss at the conclusion of the people's case.

POINT I

THE DISTRICT COURT WAS IN ERROR
IN HOLDING AS A MATTER OF LAW
THAT THE STATUTORY PRESUMPTION
CONTAINED IN PENAL LAW § 265.15(3)
DID NOT APPLY TO THE FACTS OF THIS
CASE

The District Court held, that as a matter of state law, the presumption of possession was inapplicable to the facts of this case, and therefore set aside the judgment of conviction on the ground that the case should not have gone to the jury. In order to reach this conclusion the District

Court went far beyond the scope of federal habeas corpus review, which is limited to questions of constitutional magnitude and instead (a) substituted its judgment for both that of the trial court and jury, (b) wrongfully ruled on a question of sufficiency of the evidence, and (c) never determined whether the alleged error of the trial judge, upon which it relied, was of constitutional magnitude. Therefore the decision below should be reversed.

- a. The District Court substituted its interpretation of state law for that of the state trial and appellate courts

In granting the writ the District Court found that, as a matter of state law, the handguns were "on the person" of the female defendant, and therefore the presumption of possession did not apply. This conclusion is in direct conflict with that of the New York Court of Appeals which determined that the question of possession was a matter of fact to be determined by the jury. As Judge Jason wrote for the majority:

"Whether the weapons were found on the person of one of the vehicle's occupants is primarily a question of fact. Here, there was testimony that the handbag was situated on the floor of the car in the space between the front seat and the car door. The argument that the pocketbook was a part of Jane Doe's person is not an unattractive one, given the fact that women and men in our society often use handbags and purses to carry and store personal items of many kinds and are generally held directly by the hand or arm or are placed within easy reach. However, the placement of a weapon in a handbag does not necessarily indicate that the owner of handbag is in the sole and exclusive possession of the weapon. Whether the owner of the handbag is the sole possessor of the weapon depends upon the access to the bag that others may have and whether the others have knowledge of its contents. Similar reasoning might well be applied to briefcases, shopping bags with groceries, cartons, suitcases or the myriad of other things that people frequently carry or transport. To hold that merely because the weapons were found in a briefcase, handbag, shopping bag or carton the presumption is nullified would defeat the legislative intent and render the statute nugatory. Astute illegal possessors of weapons then would only need to carry weapons in any kind of personalized containers to successfully evade joint responsibility. There would be added difficulty, not present in this case, of ascribing ownership of the container to one of the passengers, a matter that might be resistant to proof where the container itself reveals no information to identify its owner or where the owner of the container is not present

in the vehicle at the time of apprehension. Surely this kind of rationale would return the law to the early days of this century when law enforcement was easily frustrated by an automobile shell game reminiscent more of vaudeville than of the courts. To be sure there may be circumstances where the evidence is clear-cut and leads to the sole conclusion that the weapon was found upon the person. For example the exception would have clear application where the weapon is secreted under the person's shirt or under other items of clothing or in a pocket. (See People v. Garcia, 41 A D 2d 560; People v. Davis, 52 Misc 2d 184 [J. Irwin Shapiro, J.]). Absent this kind of clear indication that the weapon was actually upon the person of one occupant, the question of the presumption's applicability is properly left to the trier of fact under an appropriate charge. Only the trier of fact, after hearing all the testimony and assessing the credibility of witnesses, can determine the factual issues of access and the degree to which possession is personalized. As in this case, the precise location of the container may be a critical factual issue. Although some may draw different inferences from the nature of the container and its placement, those inferences based as they are on contested facts, are generally to be drawn by juries and not by appellate judges. (Emphasis supplied)

The only authority relied upon by the District Court to reach a contrary conclusion, i.e., that, as a matter of law, the pocketbook was on the woman's person, is People v. Pugach, 15 N Y 2d 65 (1965), cert. denied, 380 U.S. 936, app. disp., 382 U.S. 20 (1965). However, Pugach is irrelevant. In Pugach, the Court of Appeals was asked to rule whether a search of a closed briefcase held in its owner's lap was on his person, and therefore the subject of a lawful "frisk". The Court of Appeals determined that the briefcase was sufficiently within Pugach's dominion and control so that an officer conducting the frisk was justified in searching it for a possible concealed weapon. In relying upon Pugach, the District Court not only failed to consider the factual differences, but more importantly, failed to consider that petitioners had vigorously argued the applicability of the Pugach definition to the Court of Appeals, an argument which was necessarily rejected by that court in its affirmance of the conviction. Accordingly, the effect of the decision below is to redetermine an interpretation by the Court of Appeals of one of its own decisions.

Insofar as the District Court premised its decision on a reinterpretation of state law - and an erroneous one, at that - it must be reversed. The holding of this Court in Schaefer v. Leone, 443 F. 2d 182 (2d Cir., 1970) is particularly appropriate to the instant case:

Upon the facts here presented, we hold that the legality of Schaefer's conviction was properly the exclusive province of the Connecticut courts. Were we to hold otherwise, the district court's rationale would turn every disagreement by a federal district judge with a state court's interpretation of a state statute and their appraisal of a state trial court's instructions thereunder potentially into a question of "fundamental due process." This result would impose an additional burden on our already overburdened federal courts and pose an unnecessary and undesirable threat of greatly increased federal intervention in cases involving the sufficiency of jury instruction and the construction of state law. Any such interpretation would be contrary to the proper role of historic federal habeas corpus jurisdiction, namely, not to serve as the basis for merely an additional appeal. As the Supreme Court has stated:

"His [the trial judge's] action has been affirmed by the highest court of the Commonwealth. We are not at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has been denied. We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question." [Gryger v. Burke, 334 U.S. 728 (1948)]."

See also Buchalter v. New York, 319 U.S. 427 (1943); Gryger v. Burke, 334 U.S. 728, 731 (1948); Schaefer v. Leone, 443 F. 2d 182 (2nd Cir.) cert. den. 404 U.S. 939 (1971); Sturm v. California Adult Authority, 395 F. 2d 446 (9th Cir., 1967) cert. den. 395 U.S. 947 (1969); rehear. den. 396 U.S. 870 (1969); rehear. den. 397 U.S. 930; Hall v. Wainwright, 493 F. 2d 37, 39 (5th Cir., 1974); United States ex rel. Sadoway v. Fay, 284 F. 2d 426, 427 (2d Cir., 1960). As the Supreme Court recently emphasized in Wainwright v. Sykes, ___ U.S. ___, 45 U.S.L.W. 4807, at 4810 (June 23, 1977):

"As to the role of adequate and independent state grounds, it is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts. Fox Film Corp. v. Muller, 297 U.S. 207 (1935); Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1875). The application of this principle in the context of a federal habeas proceeding has therefore excluded from consideration any questions of state substantive law, and thus effectively barred federal habeas review where questions of that sort are either the only ones raised by a petitioner or are in themselves dispositive of his case."

b. The District Court improperly ruled on the sufficiency of the evidence

By concluding that the facts of this case did not support the presumption of possession, the District Court implicitly ruled upon the sufficiency of the evidence before the jury. It is almost axiomatic that a federal habeas corpus court may not sit as an appellate court to review the sufficiency of the evidence in support of a conviction unless the conviction is so totally devoid of evidentiary support as to be a violation of due process. Garner v. Louisiana, 368 U.S. 157, 163 (1961); Terry v. Henderson, 462 F. 2d 1125, 1131 (2nd Cir., 1972); Edmonson v. Warden, 335 F. 2d 608 (4th Cir., 1964) (per curiam); Jenkins v. Follette, 257 F. Supp. 533 (S.D.N.Y., 1965); United States ex rel. Meckler v. Hogan, 64 Cir., 3984 (S.D.N.Y. March 3, 1965); United States ex rel. Cambell v. Rundle, 216 F. Supp (E.D. Pa. 1963), aff'd. 327 F. 2d 153 (3rd Cir., 1964); United States ex rel. Wilkins v. Banmiller, 205 F. Supp. 123 (E.D. Pa. 1962), aff'd. 325 F. 2d 514 (3rd Cir., 1963); Lee v. Henderson, 342 F. Supp. 561, 566 (W.D.N.Y., 1972).

Thus not only has the court below usurped the role of the state courts by interpreting state law, it has

also usurped the role of the jury by applying the presumption to the facts of the case. The court below inexplicably concluded that "in the circumstances of life" an inference of possession did not reasonably follow from the "mere presence of two guns in a woman's handbag." With this one glib phrase the court swept aside over eight hundred pages of trial testimony, and substituted its view of life's circumstances for that of the twelve members of the jury who heard the testimony. However, the evidence in this case should not be dismissed so blithely. Before the jury were the following salient facts ignored by the District Court. The handbag, which belonged to a sixteen year old girl, was open and positioned on the floor of the car. One of the handgun protruded from the opening of the purse. The handguns were large caliber weapons.* There was a machine gun and over a pound of heroin concealed in the trunk of the car. The car was borrowed from the brother of one of the petitioners.

* One of the weapons was a loaded .38 caliber revolver, the other a loaded .45 caliber automatic pistol. This Court may take judicial notice that both are large, heavy weapons. It was thus quite reasonable for the jury members to have inferred that the weapons were the property of one or more of the adult males in the car, rather than the underaged female, and were hastily dumped into the girl's handbag when the car was flagged down by the State Police. In any event, this was the theory advanced by petitioners' counsel when he successfully argued that Miss Murphy be granted youthful offender status.

No trunk key was found on any of the petitioners. No evidence was offered to rebut the presumption of possession attached to the handguns. However, some evidence was offered to rebut the presumption attached to the contraband in the trunk. The jury acquitted petitioners of possession of the contraband in the trunk of the car but convicted them of the possession of the handguns. It is therefore apparent that the jury intelligently weighed all the evidence in the case, applied the applicable presumptions to the evidence and reached a logical and consistent verdict. This verdict should not now be disturbed on the grounds that it doesn't comport with the district court's view of "the circumstances of life". Accordingly, the district court's determination that there was no evidence to support the verdict is incorrect and must be overturned.

- c. The trial court's denial of petitioners' motion to dismiss did not raise a question of constitutional magnitude

In an effort to overcome the serious procedural defect caused by petitioners' failure to object to the jury charge,* the court below held that the trial court was in

* Point III, infra.

error in failing to grant the petitioners' motion to dismiss at the close of the people's case, a claim which had never been articulated by petitioners at any level, let alone in the court below.* In so ruling, the District Court not only side-stepped serious consideration of the petitioners' waived objection, but also failed to consider whether the trial court's failure to grant the motion presented a question of constitutional dimensions .

The flaw in the District Court's reasoning is that mere error in the conduct of a state court trial is insufficient grounds to set aside a conviction. The error must be of constitutional dimension. The yardstick for measuring a due process challenge to a state criminal trial is the "failure to observe that fundamental fairness essential to the very concept of justice." Lisenba v. California, 314 U.S. 219, 236 (1941). In the instant case there was nothing unfair about the trial court's decision to submit the application of the presumption to the jury. In fact, according to Judge Jason's cogent analysis, only the jury was competent to decide that issue. The trial court's ruling violated none of petitioners' due process rights as they had a full and fair opportunity to rebut the presumption, an

* Even had petitioners raised this argument de novo in the District Court, consideration of this claim would have been precluded by the exhaustion doctrine. Picard v. Conner, 404 U.S. 270 (1971).

opportunity, it should be noted, they failed to employ. Furthermore, the trial court's denial of the motion was merely a determination that there was sufficient evidence to make out a prima facie case. This was solely "a state court's evidentiary ruling and not grounds for federal habeas relief." United States ex rel. Hardy v. McMann, 292 F. Supp. 191, 192 (S.D.N.Y. 1968). See, for example, United States ex rel. Evans v. Follette, 364 F. 2d 305, (2nd Cir. 1966) cert. den. 385 U.S. 1016; United States ex rel. Billups v. Montayne, 367 F. Supp. 543 (S.D.N.Y. 1973). Finally, the trial court's ruling was consistent with its earlier determination of the motion to suppress, in which it held that at least one of the handguns was in plain view.*

It is evident, therefore, that the trial court's failure to grant the motion to dismiss did not deny the petitioners a fair trial. Indeed, as Judge Jason emphasized in affirming the conviction, only the jury was competent to decide whether the presumption was applicable.

* Petitioners do not challenge this "plain view" ruling of the state trial court, nor could they in view of the Supreme Court's ruling in Stone v. Powell, 44 U.S.L.W. 5313 (1976).

Since the federal habeas corpus courts review only for violations of federal constitutional standards and not to retry cases de novo (Milton v. Wainwright, 407 U.S. 371, 377 [1972] Schaeffer v. Leone; supra, 443 F. 2d at 184), the District Court's evaluation of the trial court's conduct was in excess of its jurisdiction.

POINT II

THE PRESUMPTION CONTAINED IN
§ 265.15(3) IS CONSTITUTIONAL
ON ITS FACE

The court below did not reach the question of whether Penal Law § 265.15(3) is unconstitutional on its face, a point urged by petitioners.* In the event that this Court reaches the question, respondents submit that it is clear beyond peradventure that the statute is constitutional.

The applicable standard by which to measure the constitutionality of a criminal statutory presumption is whether it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. Leary v. United States, 395 U.S. 6, 36 (1969). The Leary rule was said to be the

* Nor did the Court address itself to appellants' argument that petitioners had not satisfied the exhaustion requirement of 28 U.S.C. § 2254 since the claim was never raised in the state courts.

"upshot" of three previous cases, Tot v. United States, 319 U.S. 463 (1943) (statute making possession of weapon presumptive evidence of prior interstate transfer by possessor held to violate a "rational connection" test), and United States v. Gainey, 380 U.S. 63, 66-68 (1965) (upholding rationality of connection between unexplained presence at an illegal still and carrying on the business of distiller), and United States v. Romano, 382 U.S. 136, 141 (1965) (holding connection between presence at site and possession, as distinguished from carrying on the business of a distiller, as "arbitrary" and "tenuous").

The New York Statute clearly meets this test. The reasons underlying the presumption are obvious ones and have been eloquently set forth in the leading case of the New York Court of Appeals upholding the presumption under a prior Penal Law. In People v. Russo, 278 App. Div. 98 (1st Dept., 1951), affd. 303 N.Y. 673 (1951), the Court held at 104-105:

"It is common knowledge that the automobile is frequently employed as an agency in the furtherance of violent and serious crimes committed not by one but by several individuals. Before the enactment of 1892-a of the Penal Law in the year 1936, where a group of persons were about to embark on a mission of law-breaking in an automobile in which a revolver was placed, no law could reach any of the occupants unless it was established that the weapon was found on the person or an occupant (People v. Persce, 204 N.Y. 397, supra; People v. Andreacchi, 221 App. Div. 136). Urgent need for legislation making the presence of a forbidden firearm in an automobile presumptive evidence of its possession by all occupants was judicially recognized (People ex rel. Defeo v. Warden of City Prison, 136 Misc. 836, opinion by Lewis, J.). It is not unreasonable to require, as the statute in effect commands, that those who occupy an automobile in which a revolver or other dangerous weapon is found should explain their knowledge of its presence in the automobile. An explanation by an innocent occupant of such a car of course, overcomes the presumption. There is thus no danger that an innocent person may become a victim of circumstances."

In the instant case the New York Court of Appeals again took occasion to note that the rational basis of the presumption lay in the obvious interplay of crime and the automobile in a society with much of both. Clearly therefore the

District Court's conclusion that there is no rational connection between a gun in a car and possession by each occupant is contrary to the determination of the Court of Appeals and moreover, contrary to the finding of the New York State Legislature in passing the statute.

It should be emphasized that the presumption here is rebuttable. The statutory presumption merely permits an inference that in the absence of some explanation*, the occupants of an automobile at the time a gun is found within it are in possession of the gun unless one of the exceptions apply. Even if no contrary proof is offered, the presumption is not conclusive and may be rejected by the jury, the prosecution at all times retains the burden of proof to establish guilt beyond a reasonable doubt. People v. Leyva, 38 N Y 2d 160, 168-169; People v. Terra, 303 N.Y. 332, 337 (1951). No burden of proof is shifted.

* The trial court charged that guilty knowledge of possession is not an element of the crime of possession; this charge was excepted to. The question of knowledge is not pursued in this writ. However, it is clear that a claim of some kind of "innocent" possession, such as absence of knowledge, might be made in an effort to rebut the presumption. See People v. Russo, supra, at 103; cf. People v. Trucchio, 47 A D 2d 934 (2d Dept. 1975); People v. Pendergraft, 50 A D 2d 531 (1st Dept. 1975); People v. Persce, 204 N.Y. 397, 402 (possession of weapons under penal code refers to knowing and voluntary possession).

The State Court of Appeals recently had occasion in a thorough and cogent opinion to sustain the constitutionality of the parallel "automobile" presumption of \$ 220.25 in regard to drugs, People v. Leyva, 38 N Y 2d 160, (1975). It is respectfully urged that the same logic and analysis of the State Court of Appeals in Leyva apply to this case. The State Court of Appeals in Leyva simply followed Leary and other recent Supreme Court presumption cases.

The Supreme Court has already approved a presumption similar to the one at issue here in People v. Terra, 303 N Y 2d 332 (1951). At issue in Terra was a New York presumption which provided that the presence of a machine gun in a room was presumptive evidence of possession by any person in the room. The Court of Appeals upheld the constitutionality of the presumption. The Supreme Court of the United States dismissed an appeal from that judgment for want of a substantial federal question, 342 U.S. 938 (1952). This of course represented a statement on the merits by the Supreme Court of precedential value. Ahern v. Murphy, 457 F. 2d 363 (7th Cir. 1972); Connor v. Hutto, 516 F. 2d 853, cert. den. 423 U.S. 929. There has been no significant doctrinal change in the applicable presumption tests that

would justify a departure from this precedential rule; the major changes have been more in the phrasing of the test than in the substance.

United States v. Leary, supra is of no help to petitioners in this case. In Leary, the Court considered the constitutionality of 21 U.S.C. 176(a) which provided that one in possession of marijuana is deemed to know of its unlawful importation. The Court declined to hold the inference of illegal importation unconstitutional but ruled that the inference of knowledge of such was a denial of due process. In the instant case, presence of a weapon in a car is not, as was the presumption in Leary, a presumption of knowledge of the contraband's antecedent origins; rather it is only a presumption of joint possession by the occupants of the car.

Recently the Supreme Court held that possession of stolen property, if not satisfactorily explained, is sufficient to raise the inference of guilt beyond a reasonable doubt that the person was aware that it had been stolen. Barnes v. United States, 412 U.S. 837 (1973). A fortiori the lesser standard of "rational connection" between the unexplained possession of recently stolen property and

knowledge that the property was stolen was also satisfied. Barnes v. United States, at 846, fn. 11. The presumption in this case is every bit as reasonable as the one in Barnes. In any event, the High Court in Barnes, Turner and Leary reserved the question as to whether the "reasonable doubt" standard should be applied in criminal law presumptions as opposed to the "rational connection" or "more likely than not" standards. Thus any suggestion by petitioners that a reasonable doubt standard applies in this case should therefore be summarily rejected. It would not be proper for a federal court to impose a higher standard on state court convictions on collateral review than is imposed in the federal system itself.

POINT III

PETITIONERS HAVE WAIVED THEIR CLAIM THAT THE "ON THE PERSON" EXCEPTION APPLIED TO THEM BECAUSE THEY DID NOT OBJECT TO THE JUDGE'S CHARGE ON THIS GROUND NOR DID THEY RAISE THIS POINT ON DIRECT APPEAL.

It is conceded that petitioner's counsel failed to except to the trial court's charge insofar as it omitted a recitation of the "on the person" exception. The District Court dismissed this serious procedural defect in a footnote

without deciding it. The District Court's off-hand rejection of appellant's extensive discussion of this point is incorrect, particularly since petitioners not only failed to except to the charge in the trial court, but, in addition, did not even claim on their appeal that the presumption was charged improperly. Indeed, although a whole point in the petitioners' Court of Appeals brief challenges the jury charge, there is no reference to the failure to charge the "on the person" exception. Such an alleged fundamental error could, of course, have been considered for the first time on appeal under New York law in order to achieve substantial justice. CPL 470.15(a) 6(a). However, it was not. Accordingly petitioners have waived their objection not once, but twice, and should be foreclosed from federal habeas corpus review.

The District Court's determination that there was no waiver is based on the fact that the petitioners argued that the "on the person" exception applied to them. However, the Court ignored the fact that the Court of Appeals expressly held that it could not decide this question since petitioners did not except to the charge in this regard. See also the opinion of

Jones, J . Therefore, this not a case where a failure to object may be overlooked by the federal court on the ground that the state courts nevertheless considered the question involved. See United States ex rel. Scott v. LaVallee, 379 F. Supp. 111, 113-114 (S.D.N.Y. 1974) and the cases cited therein.

A further reason for rejecting the District Court's analysis of the waiver issue is its reliance on the by-pass standard announced in Fay v. Noia, 372 U.S. 391 (1963), since that standard was recently abandoned by the Supreme Court. In Wainwright v. Sykes, ____ U.S. ____, 45 U.S.L.W. 4807 (June 23, 1977), the Court held that federal habeas review of a waived objection is barred absent a showing of "cause" and "prejudice". Although the Court did not define these terms with precision, petitioners herein have pleaded absolutely no "cause" for their failure to object. Indeed, they may have had in mind the very strategy described by the court in Sykes, on page 4812:

"We think that the rule of Fay v. Noia, broadly stated, may encourage sand bagging" on the part of defense lawyers who may take their chances on a verdict of not guilty in a state trial court and intend to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off."

No other explanation comes to mind, considering petitioners' vigorous arguments earlier in the trial that the "on the person" exception was applicable to them. Furthermore, petitioners were not prejudiced in view of the strong summations of defense counsel and the jury's rejection of the presumptions which attached to the machine gun and the heroin. In these circumstances, it is evident that petitioners do not meet the Sykes standard.

CONCLUSION

THE ORDER OF THIS DISTRICT COURT
SHOULD BE REVERSED AND THE WRIT
DISMISSED.

Dated: New York, New York
July 22, 1977

Respectfully submitted,

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STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

EILEEN SHAPIRO , being duly sworn, deposes and
says that She is AN Assistant in the office of the Attorney
General of the State of New York, attorney for Appellants
herein. On the 25 day of July , 1977 , she served
the annexed upon the following named person :

Michael Young, Esq.
Goldberger, Feldman & Breitbart
401 Broadway
New York, New York 10013

Attorney in the within entitled proceeding by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by him for that
purpose.

Sworn to before me this 25th
day of July , 1977

Carl Sale
Assistant Attorney General
of the State of New York

Eileen Shapiro

